

MELINDA HAAG (CABN 132612)
United States Attorney

J. DOUGLAS WILSON (DCBN 412811)
Chief, Criminal Division

JEFFREY D. NEDROW (CABN 161299)
JEFFREY B. SCHENK (CABN 234355)
Assistant United States Attorneys

150 Almaden Boulevard, Suite 900
San Jose, California 95113
Telephone: (408) 535-5045
FAX: (408) 535-5066
jeff.nedrow@usdoj.gov

Attorneys for United States of America

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

UNITED STATES OF AMERICA,) Case No.: CR 12-00887-EJD
Plaintiff,)
v.) UNITED STATES' SUPPLEMENTAL
PATRICIA DE LA TORRE and) OPPOSITION TO MOTION FOR SPECIAL
JESUS SALINAS,) INSTRUCTION RE IN LOCO PARENTIS
Defendants.)

On April 18, 2014, the defendant, Jesus Salinas, filed a motion with this Court regarding “*In Loco Parentis*” and Lack of Consent. [Docket No. 70.] On May 23, 2014, the United States filed its response to this Motion. [Docket No. 88.] Then, on September 18, 2014, the defendant filed supplemental briefing on this topic. [Docket No. 133.] The United States now files this brief, supplementing its original response to the defendant’s filing.

The defendant's supplemental briefing fails to correct and suffers from the same flaws, as his initial motion. Simply put, there is no Ninth Circuit authority for the law as he wishes it to be. The

1 defendant requests that this Court require the government to prove beyond a reasonable doubt that no
2 defendant in this conspiracy functioned as a surrogate parent. In the defendant's original briefing and in
3 his supplemental briefing, the defendant fails to cite a single Ninth Circuit case requiring such proof by
4 the government, in either a prosecution for kidnapping under Title 18, United States Code, Sections
5 1201(a)(1), (c), or (g)(1), or in a prosecution for hostage taking under Title 18, United States Code,
6 Section 1203(a). The Ninth Circuit Model Jury Instructions for a violation of § 1201(a)(1) kidnapping
7 are:

- 9 (1) The defendant kidnapped/seized/confined [the kidnapped person];
10 (2) The defendant held [the kidnapped person] for ransom, reward, or other benefit; and
11 (3) The defendant intentionally transported [the kidnapped person] across state lines.

12 Ninth Cir. Model Jury Instr. 8.114 (2010).

13 The 9th Circuit Model Jury Instructions for a violation of § 1203(a) hostage taking are:

- 15 (1) The defendant intentionally seized or detained a person;
16 (2) The defendant threatened to kill, injure, or continue to detain that person, and
17 (3) The defendant did so with the purpose and intention of compelling a third person to act, or
18 refrain from acting, in some way, as an explicit or implicit condition for the release of the seized or
19 detained person.

20 Ninth Cir. Model Jury Instr. 8.120 (2010).

22 The Ninth Circuit has never recognized an *in loco parentis* defense, nor has it required the
23 government to disprove a defendant's claim of consent or of being a surrogate parent for either offense.

24 Moreover, the defendant's request for this Court to rule, pretrial, that the government is required
25 to prove more than the required elements of the charged offenses is factually baseless. The defendant's
26 supplemental briefing continues to rely upon conclusory arguments. For instance, the defendant claims,
27 "...given the wealth of evidence that Sarani Hernandez consented to the placement of her children with
28

1 Maria Valenzuela..." he is entitled to supplement the Model Jury Instructions. Defendant's
2 Supplemental Briefing at 1. First, the defense has never provided credible evidence that Hernandez
3 consented to the indefinite detention of her children. The defendant's claim that she did is merely his
4 version of the events – an argument he is free to make at trial, but not one that entitles him to the
5 addition of unprecedeted statutory elements. Second, the defendant is asking the Court to prejudge
6 evidence regarding Hernandez and her consent or lack thereof concerning the placement of her children
7 with the defendant and his confederates. It is premature to ask this Court to make such a determination.
8 Just as obviously, the Court cannot now prejudge evidence regarding the indefinite detention of the
9 victims by Salinas and Delatorre. The government respectfully requests that the Court instruct the trial
10 jury according to the Model Jury Instructions, consistent with Ninth Circuit precedent. Nothing more,
11 nothing less.

12 As discussed in the government's original opposition, § 1201 includes a parental exception to the
13 kidnapping offense. While some circuits have extended the parental exception to surrogate parents, the
14 Ninth Circuit has not. At this point, the Court has insufficient evidence to determine, even if a surrogate
15 parent exception existed in the Ninth Circuit, whether the defendants satisfy such an exception. The
16 defendant's conclusory claim regarding "the wealth of evidence" is nothing more than another attempt
17 to try this case through pretrial motions.

18 Lastly, as discussed in greater detail in the government's original opposition, in the Tenth
19 Circuit, one that has found a surrogate parent exception, this affirmative defense may be claimed if the
20 "parent," prior to the kidnapping, performed the incidences of parenthood. *United States v. Floyd*, 81
21 F.3d 1517, 1522 (10th Cir. 1996). Even Salinas's version of events does not include a claim that he had
22 a parent-child relationship before the "taking" of these minor children. Salinas did not know them.

1 Even if the Court engaged in the type of pretrial evidentiary determinations asked of it by the defense,
2 Salinas fails to meet the Tenth Circuit's standard.

3
4 Respectfully submitted,

5 Dated: 10/9/2014

6 MELINDA HAAG
7 UNITED STATES ATTORNEY

8 _____/s/_____
9 JEFFREY D. NEDROW
10 JEFFREY B. SCHENK
11 Assistant United States Attorneys